

# HOUSE OF LORDS.

**Andrew Wauchope, Esq;**

**Appellant.**

**Sir Archibald Hope, Captain John M'Dowall, and John Wauchope, Esq; of Edmonstone,**

**Respondents.**

## The Appellant's C A S E.

**T**O the East of the City of Edinburgh, upon the Sea Shore of Prestonpans Bay, in the Lands of Duddingston, belonging to the Earl of Abercorn, there are various Edge Seams of Coal, almost perpendicular, running in parallel Lines from North to South, and which, beginning at the Sea-shore, take their Course, first, through the Lands of Duddingston, secondly, through those of Niddrie belonging to the Appellant; thirdly, through certain Parts of the Lands of Edmonstone, which lie between those of Niddrie and of Woolmet; fourthly, through the Lands of Woolmet, the property of Mr. Charteris; fifthly, through certain other Parts of the Lands of Edmonstone, whence they communicate to other Lands lying higher up the Country.

When Lord Abercorn purchased the Estate of Duddingston, the Coal, wrought in those Grounds, were cleared of Water, by the force of Engines, the same lying chiefly below the level of the Sea, and therefore, little or no Estimation was put upon it, on account of the Expence necessarily attending the working of it; but higher up from the Sea, as the Lands gradually rise, the Veins of Coal also rise in proportion, by which they can be wrought to a considerable depth, by means of a Level being carried upwards through the Coal in said Lands.

In 1723, John Biggar took a Lease of the Coal in the Estate of Woolmet for a Term of Years, whereof there are several yet to run; and in 1746, he got from the Earl of Abercorn a Lease of the Coal in the Duddingston Estate, for nineteen Years, from Martinmas 1745; and, as he probably had it then in view to get Leases of other Collieries higher up, it was provided by this Lease, "That if either of the said Parties should hereafter find it necessary, to communicate the Level of the Duddingston Coal to the Heritors (i. e. the Owners) of any of the neighbouring Grounds, they should be at liberty so to do, but under this express Condition, That the Consideration to be paid by the one Party to the other on that account, should be referred to the determination of Arbiters, to be by them mutually named."

Biggar dying without Issue, was succeeded by the late Andrew Wallace, his Brother, in whose place the Respondents Sir Archibald Hope and Captain M'Dowall, now stand; the latter, who was Wallace's Heir, having conveyed his whole Right in the Leases in question to the former.

Lord Abercorn conceiving that Wallace intended making an improper Use of the Liberty of communicating the Duddingston Level to the neighbouring Coal Owners, brought an Action in the Court of Session against him, for having it found



found and declared, that the Level was communicable only to the Owners of Lands next adjacent to those of Duddingston, and that such communication of the Level could not endure longer than the continuance of the Lease of the Duddingston Coal. The result of this action was a judgment in the following words, "That the communication of the Level, being granted during the currency of the Tack by the Lessee to a neighbouring Coal work, is not determinable by the Terms of the Tack, but that the same may subsist for the Use of the Lessee and his Heirs, so long as they shall continue to have Right and Interest in the neighbouring Coals to which the Level shall be communicated."—And this judgment was afterwards affirmed by your Lordships.

Appellant's  
Lease to Mr.  
Biggar in 1748.

The Appellant, in 1748, leased to John Biggar for nineteen Years from the then Martinmas, all the Coal and Coal-seams within his Lands of Niddrie; but doubting whether Biggar was, by his above recited Lease of the Duddingston Coal, sufficiently empowered to grant a perpetual communication of the Duddingston Level to the Niddrie Coal, this Lease therefore expressly obliges Biggar to procure Lord Abercorn's consent to the communication of that Level to the Niddrie Coal, upon his being reimbursed by the Appellant one half of the Consideration by him paid his Lordship for such communication, provided that half did not exceed the sum of 1000 Merks Scots.-----Then come other Covenants, whereby it is agreed between the Parties, first,---That in case it should be afterwards found necessary and beneficial to communicate the Level of the Niddrie Coal to any neighbouring Heritor's Coal, it should only be done with advice and consent of both Parties, and not otherwise; and the Consideration received for such communication, be equally divided between them; secondly, Biggar obliged himself to leave a sufficient Chinny (i. e. separation) Wall between the Niddrie Coal and those of the Neighbourhood, excepting in that seam of Coal whereby the Level was communicated to any neighbouring Heritor in the Terms before-mentioned, in which seam he should be at liberty to work through the Chinny Wall into the neighbouring Heritor's Grounds; thirdly, Whenever the Level should be brought up and communicated to the Coal of Woolmet, Biggar was not to communicate the benefit thereof to any neighbouring Heritor's Ground, without obtaining the Appellant's previous Consent.

Under this Lease, Biggar began working for the Niddrie Coal, and the Level which was carried up in the course of working the Coal in the Duddingston Ground, was opened into the Niddrie Ground, whereby the Niddrie Coal was wrought to the depth of the Sea level within the Duddingston Grounds; and after his death, his Brother and Heir, Andrew Wallace, continued working the Coal upwards through the Niddrie Grounds towards Edmonstone's Grounds. After Mr. Wallace's death, the Respondents, Sir Archibald Hope and Mr. McDowall, continued working the said Coal until they were within a few fathoms of the boundary between the Niddrie and Edmonstone Lands, when the Appellant considering that all this was doing, not only without the Earl of Abercorn's previous communication of his Duddingston Level, which Biggar had expressly covenanted to obtain, but also without his own consent to the communication of the Level of the Niddrie Coal to any neighbouring Heritor's Coal, equally required by Biggar's Covenant, he therefore applied to the Court of Session, by Bill of suspension, and obtained a Sift (*Injunction*) for stopping all further progress in the Works, until the above Questions were determined.

9th of September,  
1765.

Matters being in this situation, the Appellant, for peace sake, as he hoped, and at the particular request of the Respondents, Hope and McDowall, agreed with them to submit their disputes concerning the communication of the Niddrie Coal Level to Edmonstone and Woolmet, and what Consideration the Appellant was entitled to for his Consent, to the arbitration of the Lord President of the Session, who was named by the Respondents; who, being by the submission, empowered to pronounce partial awards, of this date, made an interim Order, "authorizing Sir Archibald Hope forthwith to proceed in working up the Level to the boundary of the Coal of Niddrie, with that of Edmonstone, and then opening said Level into the Coal of Edmonstone, in order to carry the same forward to the Coal in the Lands of Woolmet; referring to himself, after more full consideration and deliberation, the other points submitted to him by the Parties."

Under this interim Order, the Level was forthwith carried across the boundary into the Lands of Edmonstone, and thence to the Lands of Woolmet, without any previous Treaty or Settlement, either with Mr. Wauchope the owner of Edmonstone, or Mr. Charteris the owner of Woolmet, of the Consideration to be paid by either of them for the communication of this Level, however beneficial to both; and no further proceedings being had upon the arbitration, it expired without any determination of the other Points referred by the Arbitrator for further consideration.

Appellant brings  
his Action.

The Appellant therefore brought his action in the Court of Session against the Respondents, insisting, first, That they should be decreed to procure the Earl of Abercorn's consent to the communication of the Duddingston Level to the Niddrie Coal for carrying off the Water from it, pursuant to Biggar's express Covenant in his Lease;---secondly, That they should pay the Appellant the twentieth part of the Coals raised by them out of the Lands of Edmonstone and Woolmet, by means of the Niddrie Level having been communicated to those Lands, or in default thereof, that the Appellant should be found entitled to shut up the communication between his lands of Niddrie, and the lands of Woolmet, and to keep it shut in all Time coming;---thirdly, That they should be prohibited from communicating the Level to the Coal of any neighbouring Land Owner, without the Appellant's special consent.

Interlocutor of  
Lord Ordinary,  
24th of February,  
1770.

To this last, no opposition was made, and therefore the Lord Ordinary, by Interlocutor of this date, bearing to be by consent, "Found that under the Lease libelled, the Defender Mr. Hope, (now Sir Archibald Hope), cannot communicate the Level in the Estate of Woolmet to any Heritor's Coal above that Estate, without consent of the Pursuer Mr. Wauchope of Niddrie, and appointed both Parties to give in Memorials upon the other Points of the Cause."

But to the Appellant's first Demand the Respondents answered, That as in the Appellant's Lease of the Niddrie Coal to Biggar, Lord Abercorn's Lease to Biggar was stated to be his title to the Duddingston Level, it must have been understood by the Parties, that Biggar was bound to communicate to the Appellant such right to the Duddingston Level as he himself had from Lord Abercorn;---that any apprehension of the Levels being shut up by Lord Abercorn was groundless and imaginary, as by the judgment in the Question between His Lordship and Wallace, it had been finally determined that he could not shut up the Level; and as the Level was already communicated to the Niddrie Coal, the shutting up that communication was impracticable, and therefore the Appellant was not at all damaged by the procuring such perpetual right from Lord Abercorn.

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The Appellant replied, That Lord Abercorn's communication of the Level being thought absolutely necessary when he leased the Niddrie Coal to Biggar, the obtaining it was expressly covenanted by Biggar, the Performance whereof could not be evaded. That were His Lordship left at liberty to shut up the Level where it communicates with the Niddrie Coal, the Appellant would not only be deprived of the benefit he contracted for with Biggar, of having his Coal wrought by means of that Level, but his Coal might be totally destroyed; for should the Respondents, by the communication of this Level to the Upper Coals of Edmonstone and Woolmet, let down the whole water of these Upper Collieries into the Appellant's Grounds, and Lord Abercorn, at the same time, shut up the Level where it enters the Lands of Duddingston, the Niddrie Coal must be drowned, and the working thereof rendered impracticable.----That by the judgment above cited Biggar's liberty of communicating the Duddingstone Level to the neighbouring Collieries was determined to endure so long only as he had any right or interest in these neighbouring Collieries; so that when that interest shall cease by the expiry of his Leases of the Woolmet and Niddrie Collieries, Lord Abercorn will be at liberty to shut up the communication of this Level in the Duddingston Grounds, and would by no means find it impracticable, as pretended by the Respondents;—that the guarding against this danger was apparently the Appellant's view in binding Biggar to procure this communication from Lord Abercorn, without any limitation of endurance, and that he was entitled to a specific performance of this Covenant against the Respondents, who were to take the proper steps for obtaining Lord Abercorn's consent to a perpetual communication of this Level.

The Appellant founded his next demand upon the clauses in the lease of the Niddrie Coal, whereby it was expressly agreed, that when the level was brought forward into the Niddrie ground, Biggar should not be at liberty to communicate it to the Coal of any neighbouring Heritor, without the Appellant's advice and consent, and his receiving half of the Consideration-money to be paid therefore; and whereby Biggar has expressly bound himself to leave a sufficient chimney or separation wall between the Niddrie Coal and the Grounds of those other Heritors upon all the different seams running from the one ground into the other, excepting that seam of Coal whereby the level was to be communicated to any neighbouring Heritor *in the terms beforementioned*.—Whence it is plain, that the level having been communicated to the Edmonstone and Woolmet Collieries without the Appellant's consent, he was either entitled to an adequate consideration on that account, or, if refused, had right to shut up the Communication.

The Respondents answered, That Biggar's view from the beginning, being to carry up this level to the Woolmet Coal of which he was Lessee, the above restriction which he had laid himself under, was not meant to comprehend the lands of Woolmet or Edmonstone, which last lying between Niddrie and Woolmet, made it necessary for coming at the Woolmet Coal, that the level should be carried through them, and that such was the sense and understanding of both parties at the making the lease of the Niddrie Coal.

The Appellant replied, That the views of either party at the making the lease were mere conjecture, but the written contract was alone the rule of judgment; that one clear and positive rule being thereby laid down restraining the communication of the level to any neighbouring land owner's Coal, without the Appellant's advice and consent, upon an adequate consideration to be paid, and no exception made of the grounds of Edmonstone and Woolmet, the distinction contended was repugnant both to the words and intent of the contract. The owner of Edmonstone was no party to this contract; he had no title to demand a communication of the level to his Coal without paying an adequate consideration for it; although his consent was absolutely necessary to authorize the carrying it through his ground. That the matter was, if possible, made clearer by the subsequent clause, obliging Biggar to leave a sufficient separation wall between the Niddrie Coal, and those of the neighbouring land owners, other than that seam of Coal thro' which the level was to be communicated *in the terms beforementioned*. Now the *terms beforementioned*, were those whereby the level was not to be communicated to any neighbouring Heritor's Coal, but by the Appellant's advice and consent, *and no otherwise*. And as the lands of Edmonstone were immediately contiguous to the lands of Niddrie, the separation wall thereby conditioned to be left between the Niddrie Coal and those of any other Heritor, must have had for its immediate object the next adjacent grounds of Edmonstone.

The Respondents then relied much upon that other clause in the lease, which provides, "That whenever the said level is brought up and communicated to the Coal of Woolmet, the said John Biggar shall not communicate the benefit thereof to any neighbouring Heritor's grounds without the advice and consent of the said Andrew Wauchope first had and obtained thereto."—Whence they argued, that as this necessarily supposed the levels being previously brought up to the Woolmet Coal, the parties must have meant that Biggar should, in all events, be at liberty to communicate the level to the Woolmet Coal, without any previous consent of the Appellant for so doing.

The Appellant answered that the inference was not warranted by the premises. The absolute restraint from all communication of the level to any neighbour but by the Appellant's consent, *and no otherwise*, was already established in most express words, and this clause therefore, superfluous and unnecessary in every sense, but as demonstrating the Appellant's over anxiety to guard against such communication to any upper Land-owner, could, by no rule of construction, hitherto adopted, defeat a clear and positive prohibition by introducing an imply'd exception of the lands of Edmonstone and Woolmet; when, had such been meant, no reason can be assigned why it was not expressed.

Lastly, The Respondents urged, that as the consideration to be paid for communicating the Level was to be equally divided between the Appellant and Biggar, which clearly supposed such consideration payable by some other person than the contracting parties, the Woolmet Coal could not be comprehended therein, since Biggar being Lessee thereof, must himself have paid the half of such consideration, instead of receiving payment of that half from some third person.

The Appellant answered, that in none of the clauses respecting the consideration to be paid by neighbouring Land-owners for the communication of this Level, was any mention made of, or regard had to, the interest of the Lessees of any of these upper Collieries. The Owners of the Ground were those to whom the Level was to be communicated, and were consequently considered as the persons to pay the consideration. Mr. Charteris was proprietor of Woolmet, and the Respondent Mr. Wauchope, of Edmonstone Grounds; with them therefore, and not with their Lessees, were the terms of the communication to be settled, and the consideration by them to be paid.

The Lord Ordinary took the Debate upon these points to report to the whole Court, who, 7th February 1771, pronounced the following Interlocutor, "Upon Report of Lord Kennett, and having advised the informations for both parties, the Lords find that John Biggar had a right by the Lease entered into betwixt him and the pursuer to carry his level through the Pursuer's Lands, and to communicate the same to the Coal of Woolmet. And therefore find that the said Pursuer is not entitled to a recompence from the Defenders on account of the communication of the said Level to the Coal of Woolmet, nor on account of its being carried through a part of Edmonstone Ground and Coal which lies interjected between Niddrie and Woolmet, in respect the carrying it through Edmonstone Coal was essentially necessary for communicating the Level with Woolmet, which was one great view of the parties at entering into the contract. And find that the Pursuer cannot shut up the said Level, but that the communication thereof



" to Woolmet Coal must subsist for the use of the Defenders, who derive right to Woolmet Coal as Heirs or Assignees of the said deceased John Biggar, so long as they shall continue to have right and interest in the said Coal of Woolmet, and therefore affoizze (*abolue*) the Defenders from these conclusions of the Pursuer's libel, and decern; and remit to the Lord Ordinary to hear parties on the other points of the Cause, and to do therein as he shall find just."

The Appellant being advised that this interlocutory Decree, which determines only part of the Cause, has no foundation in Law or Justice, has appealed therefrom to your Lordships, and humbly hopes it will be reversed;—his the Appellant's previous assent to any communication of the Level declared necessary;—and that in default thereof he may shut up the Level, for the following among other

## R E A S O N S .

- I. The Covenant in the Lease is clear and express, that the Level shall not be communicated from the Appellant's Coal of Niddrie to the Coal of any neighbouring Heritor, but by the mutual consent of the Appellant and his Lessee, and for a consideration to be divided between them. The Respondent Mr. Wauchope of Edmonstone's Coal, is the Coal of the next neighbouring Heritor, and therefore manifestly included within the covenant, if the words have any meaning at all. Mr. Charteris's Coal of Woolmet, which joins to Edmonstone, is also the Coal of a neighbouring Heritor, so the covenant not only prohibits the direct communication to it as such, but excludes all power of doing it indirectly, by first going through the Edmonstone Grounds, otherwise than with the Appellant's consent, in terms of the agreement.
- II. The other obligation on the Lessee to keep up a separation wall between the Appellant's Coal and the Coals of the Neighbourhood, shews that the Level was not to be communicated to the Edmonstone Coal, or, indirectly through it, to the Woolmet Coal; the obligation being absolute, with an exception only of the seam of Coal whereby the Level was to be communicated to any neighbouring Heritor, in terms beforementioned; which words are express and explicit to prove the intent that the Level should not be communicated to any neighbouring Heritor's Coal, without the advice and consent of both parties: and indeed this express covenant was but a superabundant caution for preserving the Appellant's legal right as Owner of the Inheritance, which, alone, excluded the Lessee from all power of communicating the Level without the Appellant's consent.
- III. Biggar's subsequent Covenant, not to communicate the Level, when brought up to Woolmet Coal, to any neighbouring Heritor's Grounds without the Appellant's consent, so far from warranting the Respondent's inference therefrom, affords an additional argument against them. The Respondent's construction of this part of the agreement makes the Lease contradictory and inconsistent; the Appellant's makes it consistent throughout. The former Covenant provided against the communication of the Level to any neighbouring Heritor without the Appellant's Consent. This supposes it brought up to Woolmet with such Consent, (else the deed is contradictory) and introduces another provision against a further communication of the Level, which was very proper, as otherwise it might have been a question whether the Appellant could prevent the Owner of the Woolmet Coal, or his Lessee, if once the Level was brought into their Coal, from communicating it farther up, as Coals or Collieries above Woolmet, might, strictly speaking, not fall within the description of the Coals of neighbouring Heritors to the Appellant, from whom they lay at a distance. In short the Appellant's object was to prevent the communication of this Level to any Coal whatsoever without his consent; and both the Clauses in the Lease were judged necessary for securing that end.
- IV. The supposed great view of the Parties of communicating the Level to Woolmet Coal, whereon the Interlocutor is founded, cannot be collected from any one particular before the Court. It is not so much as once intimated in the Lease, that Biggar was Lessee either of the Edmonstone or Woolmet Coals. The intent of parties can be inferred only from their written agreement when such agreement is, like the present, clear and decisive; nor can the contract itself be expounded otherwise than by the legal and received import of the words themselves. Now, there is not one word in the whole Lease importing any more particular view of communicating the Level to Woolmet Coal than to any other neighbouring Colliery, or doing it otherwise than by Consent of both Parties. There was, indeed, a general view of communicating it to the neighbouring Collieries upon the terms stipulated, and upon that is grounded a supposition of the Level's being eventually brought up to Woolmet, when the Parties thought fit to make a farther provision. But this, surely, no way supports the proposition laid down in the Interlocutor, nor can have any operation in establishing a right to carry the Level to Woolmet Coal without the Appellant's consent.
- V. If the Respondents, Sir Archibald Hope and Capt. McDowall, could not lawfully communicate the Level from the Appellant's Coal to Edmonstone Coal, and thence to Woolmet Coal, without his consent, then it follows of consequence that the Appellant is not only intitled to an adequate recompence for the benefit that has accrued to the Respondents for the time past by the communication made, but to shut up the Level (if that can be effectually done) at the Respondent's expence.

JA. MONTGOMERY.  
AL. FORRESTER.  
JOHN ORD.





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HOUSE OF LORDS.

*Andrew Wauchope, Esq; — Appellant.*

*Sir Archibald Hope,  
Capt, John M'Dowall, and } Respondents.  
John Wauchope, Esq.*

APPELLANT'S CASE.

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To be Heard at the Bar of the HOUSE OF LORDS  
on the Day of 1773